R.D. # 0009-04
Ridgefield, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

ARGIX DIRECT, INC.[1]
Employer

and **CASE 22-RC-12480**

LOCAL 11, INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all full-time and regular part-time drivers employed by the Employer at its Ridgefield, New Jersey facility. The Employer asserts that its drivers are not employees, but rather are independent contractors not covered by the Act and, therefore, the petition should be dismissed. The Petitioner asserts that the drivers are employees within the meaning of the Act.

I find, for the reasons described below, that the drivers are employees within the meaning of the Act and that, therefore, the petitioned for unit is appropriate.

[1] The name of the Employer appears as amended at the hearing.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding,[2] I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization involved claims to represent certain employees of the Employer.[4]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:[5]

> **All full-time and regular part-time drivers employed by the Employer at its Ridgefield, New Jersey facility, excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees**.

---

[2] The briefs filed by the parties have been duly considered.
[3] The Employer is engaged in the business of transportation and distribution, with a facility in Ridgefield, New Jersey, the only facility involved herein.
[4] The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
[5] There are approximately 63 employees in the unit.

BACKGROUND

The Employer is a motor carrier, subject to the United States Department of Transportation, supplying transportation and distribution services to retailers under what is known as "source to store" delivery. Its core business, then, is delivery. It picks up shipments at various sources as directed by its customers and transports them to one of its two retail sort centers, one of which is in Jamesburg, New Jersey. In Jamesburg, it reconfigures those shipments for delivery to one of forty store delivery terminals, three of which (including the Ridgefield facility) are owned and operated by the Employer. Once there, it again reconfigures the shipments into organized retail store deliveries. Those reconfigured shipments are then loaded and delivered to various retail stores by owner operators who are the petitioned-for unit of drivers in this matter.

To optimize the retail-store deliveries made by the Ridgefield drivers, the Employer uses a computer program called "Roadshow," which develops what the Employer calls a "unique delivery solution." Roadshow calculates the number of packages and stops that can reasonably be made within a particular service are and prints out a manifest setting out the deliveries to be made. The Roadshow manifest suggests the order that the deliveries be made, including proposed arrival and departure times for each stop on the suggested delivery route. Each of the 63 drivers is provided with his or her own Roadshow manifest for the day.

Although there is disagreement regarding the extent to which drivers may depart from the suggested delivery order, the manifests in evidence showing actual deliveries made indicate only minor departures from Roadshow's suggested order. Also,

although the drivers are paid on a per-mile basis, the mileage calculation is from the Roadshow manifest, regardless of the actual mileage driven. When the driver completes the deliveries on the daily manifest, he or she must return to Ridgefield to turn in the day's paperwork.

LEGAL ANALYSIS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The United States Supreme Court in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968) observed that Congress did not in the Act define "independent contractor," but intended that in each case the issue should be determined by the application of general agency principles. According to the Court, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." Id. at 258. The Court further stated that there is no "shorthand formula" or "magic phrase" associated with the common-law test. Id.

In two leading cases, both involving delivery drivers, the Board reaffirmed that the common law test of agency determines an individual's status as an employee or independent contractor. *Roadway Package System*, 326 NLRB 842 (1998) (finding drivers to be employees) and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998) (finding drivers to be independent contractors). While acknowledging that the common-law agency test "ultimately assesses the amount or degree of control exercised by an employing entity over an individual," the Board in *Roadway* rejected the proposition that those factors that do not include the concept of "control" are insignificant when compared to those that do. Id at 850.

Under the common law right of control test, the distinction between employees and independent contractors has turned on whether the purported employer controls or has the right to control both the result to be accomplished and the manner and means by which the purported employee brings about that result. *Gold Medal Baking Co.*, 199 NLRB 895, 896 (1972). Among factors considered significant at common law in connection with the "right to control" test in determining whether an employment relationship exists, according to the Board in *Standard Oil Co.*, 230 NLRB 967, 968 (1977), are:

> (1) Whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business;
> (2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory;
> (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products;
> (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company;
> (5) whether they account to the Company;
> (6) whether particular skills are required for the operations subject to the contract;
> (7) whether they have proprietary interest in the work in which they are engaged; and,
> (8) whether they have the opportunity to make decisions which involve risks taken by an independent businessman which may result in profit or loss.

In *United Insurance*, above at 259, the Supreme Court considered the status of insurance agents, noting that they worked primarily away from the company's offices and fixed their own hours of work and workdays. The Supreme Court identified "the decisive factors" in its determination that insurance agents were employees as follows:

> [T]he agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

In *Roadway*, the Board found that many of the characteristics of the employment relationship identified as decisive in *United Insurance* applied to the relationship between the employer and the drivers in *Roadway* and thus supported the finding that the drivers were employees. The Board observed in *Roadway*, above at 851:

> [T]he drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All of these factors weigh heavily in favor of employee status.

The determination of whether an employee is an independent contractor is quite fact-intensive. *United Insurance*, above at 258. In *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982), the Board elaborated:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.

The party seeking independent contractor status has the burden of proving such status. *BKN, Inc.*, 333 NLRB No. 14 (2001). In applying the facts of the instant matter to the tests set forth in *United Insurance*, *Roadway* and *Standard Oil*, I am mindful that the burden of proof is on the Employer to show the reasons that its drivers, all of whom are owner-operators, should be excluded from coverage of the Act. Applying the tests, examining all of the incidents of the relationship between the Employer and the owner-operators, I find that the factors weigh more strongly in favor of employee status for the Employer's owner-operators. The owner-operators here have much in common with the workers found to be employees in *United Insurance* and *Roadway* and exhibit the characteristics found to evidence employee status listed in *Standard Oil*.

At the Hearing, the Employer emphasized the fact that the drivers are owner-operators who either own or lease their own trucks and are responsible for their maintenance, repairs and insurance. However, being an owner-operator is not synonymous with being an independent contractor. *Slay Transportation Company, Inc.*, 331 NLRB 1292 (2000). While it is true that truck ownership can suggest independent contractor status where, for example, an entrepreneur with a truck puts it

to use in serving his or another business' customers, there is no direct evidence that this is the case here. It is the Employer's burden to clarify this matter if it intends to rely on it. Due to the lack of evidence on whether owner-operators operate independent businesses, I cannot so find.

Rather than operate as independent businesses, the owner-operators perform functions that are a regular, essential and integral part of the Employer's business operations. See, *Corporate Express Delivery Systems*, 332 NLRB No. 144 (2000); *United Insurance*, above at 259; *Standard Oil Co.*, above at 968. Indeed, the owner-operators perform more than an "an essential part" of the Employer's business—they are the very core of its business – delivery. Whatever disagreements there are regarding drivers' ability to alter their routes, there appears to be no dispute that drivers perform their work with "considerable assistance and guidance" from the company's Roadshow system.

In *Slay Transportation Co., Inc*., above at 1294, the Board discussed the fact that owner-operators not only performed an "essential" part of the Employer's normal operations, but were the very core of its business. The same is true in the instant matter. The core of the Employer's business operation is delivery; the owner-operators perform that delivery service for the Employer. The instant matter is not a situation as in *Dial-A-Mattress*, where delivery drivers who were found to be independent contractors did not perform work that was at the core of the company's business, which was the marketing and selling of mattresses.

The Employer argues at length that within the parameters of the "unique delivery solution" provided daily to the drivers, those drivers can choose their own

routes, but this is not inconsistent with employee status. *Standard Oil Co.*, above at 972 (decisions as to what route to follow "are made every day by deliverymen whose employment status is never questioned and involve little if any independent judgement"). I find that in performing the work here, owner-operators do not display the decision-making authority that characterizes the work of independent contractors.

Further, the evidence reflects that owner-operators do not have a substantial proprietary interest beyond their investment in their trucks. There is no evidence that owner-operators negotiate their rates of pay. See, *Corporate Express Delivery Systems*, above at p.1. Likewise, I find that the extent to which owner-operators function as entrepreneurs is limited at best. Owner-operators cannot maximize their income by significantly altering their routes. *Corporate Express Delivery Systems*, above at p.1. There is no evidence that drivers choose a destination because hauling to or from that point will increase their incomes. Id. Rather, by all accounts, the drivers appear for work and are given their delivery manifest, which sends them on a different route, frequently in different service areas, each day. There is no evidence that income is a factor in deciding to reject a route. Id. I find on this record that owner-operators do not consistently make decisions that involve risk of loss or profit. *Standard Oil Co.*, above at 968.

Thus, a review of the “right to control” factors for the Ridgefield drivers leads to the finding that they are not independent contractors: the drivers perform functions that are an essential part of the Employer’s business; they have a permanent working arrangement with the Employer that ordinarily continues as long as performance is satisfactory; they are given considerable assistance and guidance from the Employer in

the performance of the Employer's business (Roadshow manifests); the agreement containing the terms and conditions under which they operate is promulgated and changed unilaterally by the Employer; they are accountable to the Employer; yet they do not require specialized skills to perform their duties; they do not have a proprietary interest in the work; and they do not have the opportunity to make decisions which involve the type of financial risks associated with an independent businessperson.

In sum, I find that the above-described factors clearly indicate that owner-operators here are employees rather than independent contractors. In this regard, I find that the Employer failed to meet its burden to show that owner-operators are independent contractors and, therefore, should be excluded from coverage of the Act. Therefore, based on the above and the record as a whole, I find that owner-operators are employees, not independent contractors, and should be included in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12

months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by: **Local 11, International Brotherhood of Teamsters.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); NLRB *v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, Veterans Administration Building, 20 Washington Place, 5th Floor, Newark, New Jersey 07102,

on or before **June 23, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **June 30, 2004**

Signed at Newark, New Jersey this 16th day of June, 2004.

/s/ Gary T. Kendellen

_____

Gary T. Kendellen, Regional Director
NLRB Region 22
Veterans Administration Building
20 Washington Place, 5th Floor
Newark, New Jersey 07102